ONG BEE YAM

v.

OSPREY SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, MIRI
ELIZABETH M CHAPMAN JC
[SUIT NO: MR 8 OF 1992]

CIVIL PROCEDURE: *Affidavit - Deponent not party to proceedings - Whether had locus standi to affirm affidavit on plaintiff's behalf - Personal knowledge of deponent*

SUCCESSION: *Administrators - Powers of - Letters of administration made no reference to certain property - Whether administratrix could bring claim for recovery of property - Whether property must be included in grant of letters of administration - Whether defect could be remedied by obtaining new letters of administration - Administration of Estates Ordinance, s. 16(1)*

The plaintiff sued as an administratrix of an estate in respect of two lots of property owned by the 1st defendant. The 1st defendant then issued a summons in chambers under O. 18 r. 19(1) of the Rules of the High Court 1980 for an order that the plaintiff's writ of summons and statement of claim be struck out alleging that the plaintiff had no *locus standi* to institute action since the two lots of property were not listed in the letters of administration as assets of the deceased. Subsequently, the plaintiff obtained new letters of administration which included the words 'other assets: to institute civil claims and proceedings on behalf of the Estate of Polycarp Soon'.

The 1st defendant also made a preliminary objection on the affidavit of one Sylvester Soon (SS) on the ground that he had no *locus standi* or legal capacity to affirm the said affidavit, because SS, was the eldest son of the deceased and the plaintiff, and not the plaintiff, to whom the letters of administration were issued. Thus he would have no personal knowledge of the facts contained in the affidavit. It was further contended that the letters of administration were granted to the plaintiff and she could not delegate her power of authority to SS.

Held:

[1] The plaintiff had based her claim on the documents she had in her possession. As the deponent had also access to those documents and records, he must necessarily have knowledge of the facts to which he deposed. The preliminary objection was therefore dismissed.

[2] The letters of administration made no reference to the 1st defendant's land and neither was it stated that the plaintiff could bring any claim in respect of the first defendant's land. The plaintiff therefore had no legal capacity to bring this action on behalf of the estate of the deceased.

[3] A right of action, being part of a deceased person's estate, must be included in a grant of letters of administration before it can be enforced by an administrator.

[4] The plaintiff was wrong in obtaining new letters of administration as s. 16(1) of the Administration of Estates Ordinance ('the Ordinance') was not complied with. Section 16(1) requires that any asset omitted from the inventory may be declared by a further affidavit and the asset added by the probate officer to the list annexed to the grant.

[5] There is nothing in s. 14(1) of the Ordinance to say that an authentication made under this section has retrospective effect. Thus the second letters of administration had no retrospective effect. It took effect from the day it was made and could not relate back.

[Application allowed.]

Cases referred to:
Abdul Halim bin Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors [1996] 4 MLJ 54 ***(dist)***
King Hock Ching v. Ung Siew Ping [1974] 2 MLJ 16 ***(foll)***

Legislation referred to:
Administration of Estates Ordinance (Cap 80) (Sarawak), ss. 16(1), 14(1)
Rules of High Court 1980, O. 18 r. 19(1), O. 41 r. 5(2)

For the plaintiff - Florence Lam; M/s Raymond Lam & Assocs
For the 1st defendant - Lawrence Lai; M/s Awang Lai & Co

Reported by Anne Khoo

JUDGMENT

Elizabeth M Chapman JC:

This is the 1st defendant's summons in chambers under O. 18 r. 19(1) for an order that the plaintiff's writ of summons and statement of claim to be struck out or alternatively, that the 1st defendant be given extension of time to file and serve their defence within 14 days after the determination of this application (if required and if necessary).

This application is supported by affidavit of Wong Chong Sey affirmed on 25 May 1996. At the outset learned counsel for the 1st defendant raised a preliminary objection on the affidavit of Sylvester Soon affirmed on 11 June 1996, on the ground that he had no *locus standi* or legal capacity to affirm the said affidavit. The deponent deposed to the affidavit as the eldest and only son of the plaintiff and the facts and matters therein were from his own knowledge and/or from records and documents in the possession of the plaintiff. Further, his affidavit disclosed that his mother, the plaintiff, was overseas on 24 May 1996 and would only be back on 16 June 1996 by which time it would be too late to reply to Wong's affidavit. That being the case, the deponent affirmed the affidavit and upon the plaintiff's return, she would put in a further affidavit if that was necessary. The contention here is that the deponent, Sylvester Soon, had no personal knowledge and that the letters of administration exh. "WCS 2" was issued by the Miri Probate Office to the plaintiff. Hence, the plaintiff, as Administratrix of the estate of the deceased, Polycarp Soon, could not delegate her power or authority – under the Administration of Estates Ordinance (Cap. 80). The deponent had no *locus standi*. The court was referred to the case of *Abdul Halim bin Abdul Hanan & Ors. v. Pengarah Penjara, Taiping & Ors.* [1996] 4 MLJ 54. This case, however, can be distinguished for the plaintiff's counsel had in his affidavit claimed that the averments contained therein were within his personal knowledge which he had obtained from the plaintiffs themselves. The court there held that as plaintiff's counsel was not a prisoner of the Taiping prison at the material time, he would not be able to depose of facts alleged to have occured at the said prison.

Order 41 r. 5(2) Rules of High Court 1980 states:

> An Affidavit sworn for the purpose of being used in an interlocutory proceedings may contain statements of information and belief with the sources and grounds thereof.

Here the deponent had access to the documents and records; it cannot therefore be said that he had no knowledge for the plaintiff herself based her claim on the documents she found. The inability of the plaintiff to put in her affidavit had been adequately explained and again this case can be distinguished from the *Abdul Halim* case (*supra*) as in the said case, the counsel could not claim to have personal knowledge of the hunger strike and the events that followed following the hunger strike as he himself was not a prisoner at Taiping prison; that being the case, the plaintiff's subsequent affidavit confirming the facts deposed to by their counsel without averring to the facts themselves would not validate the plaintiff's case. It must be pointed out that in this present case, Sylvester Soon had access to the documents which were in his mother's possession and by virtue of that he must necessarily have knowledge of the

facts to which he deposed. I would, for the above reasons, dismiss this preliminary objection.

I will now deal with the application for striking out. From the affidavit evidence, it is clear that the plaintiff is suing as an adminstratix of the estate of the late Polycarp Soon who died on 25 September 1986. The subject matter of the plaintiff's High Court Suit is in respect of Lot 526 and Lot 527 Lambir Land District belonging to the 1st defendant. Letters of administration granted to the plaintiff on 11 October 1988 states: "The following summary of the account submitted shows the assets declared. This letter gives authority to deal with these items only and no others". However, Lots 526 and 527 are not listed in the letters of administration as assets of the deceased. Thus, it was argued by Learned counsel for the 1st defendant that the plaintiff has no l*ocus standi* to institute this writ on behalf of the estate as the defendant's land is not listed in the letters of administration.

It is pertinent to note that in *Ong Ah Ngim v. Lau Kiok Kia* [1956] Supreme Court Bodley J held that a right of action, being part of a deceased person's estate, must be included in a grant of letters of administration before it can be enforced by an administrator. Further at p. 5 the Learned judge went on to say:

> The provisions of the Ordinance to which I have referred, thus make it quite clear that the right of action for damages has not vested in the plaintiff though he has been granted letters of administration and that he has no right at present to bring this action for damages. Learned counsel for the defence would have me dismiss this action because the plaintiff has no title to sue. It would, however, be an extremely simple matter for the plaintiff to obtain a proper title by complying with s. 16 of the said Ordinance which provides *inter alia* that any asset omitted from the inventory required by s. 5 (a) may be declared by a further affidavit, and the asset added by the Probate Officer to the list annexed to the grant after payment of such further duty and interest as may be due thereon. In my view, it would be a denial of justice to dismiss this action for want of title. I therefore propose (a) to allow the plaintiff an adjournment so as to give him the opportunity of completing his title and (b) to compensate the defendant for the adjournment by allowing him the costs occasioned thereby.

In *King Hock Ching v. Ung Siew Ping* [1974] 2 MLJ 16 Tan Chiaw Thong J said at p. 19:

> In this connection, in the case of *Ong Ah Ngim v. Lau Kiok Kia* it was held by the then High Court at Kuching that the right of action is part of the assets of a deceased's estate and that before a plaintiff can bring an action pursuance of this right, it must have been vested in him. In that case, it was held, *inter alia*, that the right of action to sue for damages must be included in a grant

> of letters of administration before it could be enforced by an administrator. This part of the decision in that case turns upon the construction of the relevant provisions of the Ordinance which have not been amended up to now. With respect, I agree with the decision of the then High Court. Accordingly, in this case, the right of action to sue on the subject matter of this action must be shown to have been vested in the plaintiff as adminsitrator when this action was commenced, since such a right forms part of the assets of the estate of the deceased. By this action the plaintiff seeks to enforce such a right, ie, to sue the defendant so as to recover the money owing at such date into possession. Therefore, such a right being a chose in action, is an asset in Sarawak, and before the plaintiff can sue, he must have had the Singapore Letters of Administration authenticated under s. 14 (1) of the Ordinance.

The letters of administration (annexure 'WCS 2') makes no reference whatsoever to the 1st defendant's land and neither is it stated in the Letters of administration that the plaintiff could bring any claim in respect of the 1st defendant's land. The plaintiff therefore has no legal capacity to bring this action on behalf of the estate of the deceased.

On 1 March 1996 the plaintiff obtained a new LA from the Probate Office, Miri (see annexure 'OBY 1' annexed to the plaintiff's affidavit affirmed on 5 July 1996). This is clearly wrong. Section 16(1) of the Administration of Estates Ordinance (Sarawak Cap. 80) should have been complied with. The said s. 16 (1) reads:

> Any asset omitted from the inventory required by s. 5 (a), may be declared by a further affidavit, and the asset added by the Probate Officer to the list annexed to the grant, after payment of such further duty and interest as may be due thereon.

(see also *Ong Ah Ngim v. Lau Kiok Kia* (*supra*)). The plaintiff cannot therefore apply for another LA which now includes under the heading "OTHER ASSETS: to institute civil claims and proceedings on behalf of the Estate of Polycarp Soon." In any event the second letters of administration has no retrospective effect. It took effect from the day it was made and cannot relate back. There is nothing in s. 14 (1) of the Ordinance to say that such authentication shall have restrospective effect. In *King Hock Ching v. Ung Siew Ping* (*supra*) the Learned judge went on to say at p. 20:

> In my opinion, an authentication made under s. 14(1) of the Ordinance has the effect of a grant by the Probate Officer in respect of the assets of the deceased specified in the schedule to such authentication (see s. 14(3)). There is nothing in the Ordinance to say that any such authentication shall have retrospective effect. The case of *Burns v. Campbell*, *supra*, would appear to support this view... A nullity is a still-born thing and I do not think, on the authorities that the subsequent re-sealing of Mrs. Patel's Indian succession

certificate had the effect in law of resurrecting something that was dead. Accordingly, even on the asumption that the authentication in this case has been properly made under s. 14(1) of the Ordinance, I hold that such an authentication took effect from the day on which it was made and has no retrospective effect.

From a perusal of the Statement of Claim, the plaintiff's cause of action derives from three agreements, annexures "WCS 3", "WCS 4" and "WCS 5", These three agreements including the guarantee (annexure 'WCS 6') are undated and unstamped.

Further, in one of the three agreements ('WCS 5') it was not signed by one of the parties concerned. They are therefore not admissible in civil judicial proceeding.

For the reasons given above, I hold that the 1st defendant succeeds in his application and I hereby make an order in terms as prayed for.